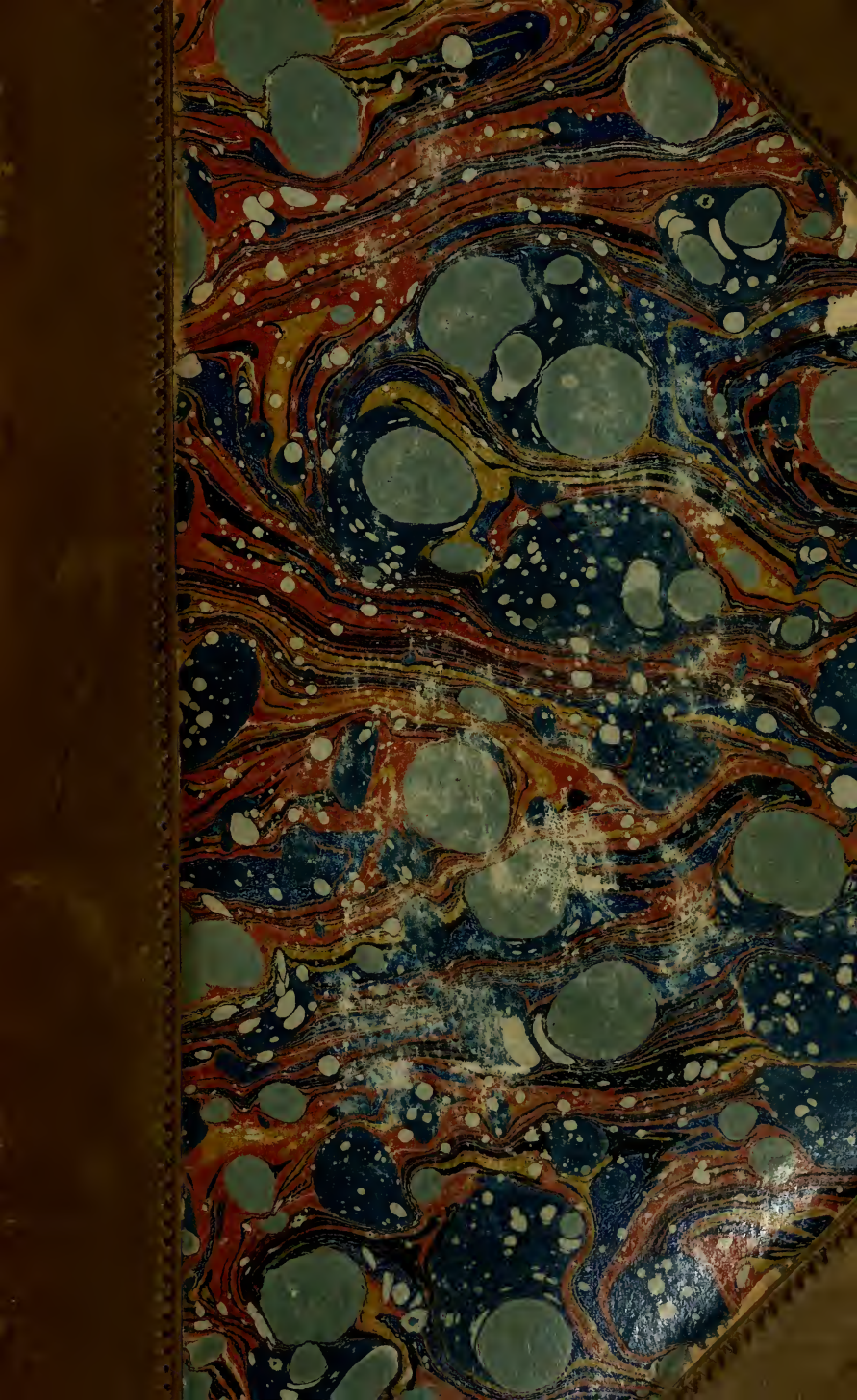

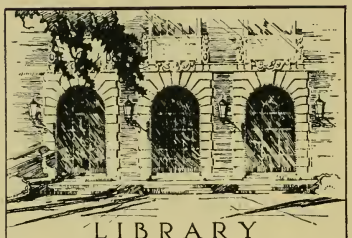

from the author

REMARKS

ON THE

JUDGMENT OF THE PRIVY COUNCIL

IN

HEBBERT *v.* PURCHAS.

BY A BARRISTER.

LONDON:
SWIFT AND CO., REGENT PRESS, KING STREET,
REGENT STREET, W.

THE

JUDGMENT OF THE PRIVY COUNCIL

IN THE CASE OF

HEBBERT *v.* PURCHAS.

In reviewing this very remarkable judgment, we have no intention of plunging into the intricacies of English ecclesiastical history and antiquities, nor do we mean to compare the canons laid down by it with the great principles of Catholic doctrine or ritual. Both these are important points, often treated of, but still probably requiring further elucidation. Our aim is a humbler one, though perhaps one more immediately practical: to try the judgment by the principles laid down in other judgments of the same tribunal, and by the ordinary everyday maxims of English law, and, indeed, of common sense.

In doing this, we must not forget the great disadvantage under which the tribunal laboured, of having to decide on an undefended case. It is true that all the points under discussion which came before it had been of necessity, since this was an appeal, decided the other way in the court below; and that an elaborately reasoned judgment might in some degree take the place of a defence. But, on the other hand, the line of argument taken by the prosecution, consisting mainly of an appeal to an accumulation of ancient documents and antiquarian memorials, would in any case require the hand of a skilful counsel, to sift the vast confused mass of materials, and to "weigh rather than count" the witnesses; and secondly, in this particular case, the great previous ignorance of the individual members of the tribunal on the subject-matter on which they were to decide, rendered them peculiarly open to the arts of an adroit advocate, and peculiarly liable to confusion "in the mighty maze," for which their own knowledge supplied them with no "plan."

Yet, as one of the principal objects of this article will be to compare this judgment with that given by the Privy Council in the case of Westerton *v.* Liddell, in 1857, it may not be amiss to enter into some comparison of the composition of the court in the two cases.

In Westerton *v.* Liddell the court consisted of Lord Cranworth (Lord Chancellor); Lord Wensleydale; the Right Hon. T. Pemberton Leigh, afterwards Lord Kingsdown; Mr. Justice Patteson; Mr. Justice Maule; and the Archbishop of Canterbury (Dr. Sumner) and the Bishop of London (Dr. Tait), as assessors.

Compare this list, a list of five judges and two bishops—two of the judges, Lords Wensleydale and Kingsdown, men of the highest name among English judges, men who above all others of modern days have left their mark on the principles of our law; all the five renowned for careful work and precision of thought above the average of judicial merit, all of them studiously impartial,—with the present meagre tribunal:

Lord Hatherley (Lord Chancellor); Lord Chelmsford; the Archbishop of York; the Bishop of London.

Then let it be remembered that Lord Hatherley signed, as a member of the Ritual Commission, the first and second reports of that commission, without dissent or comment, the first saying:

> We are of opinion that *it is expedient to restrain* in the public services of the united Church of England and Ireland, *all variations in respect of vesture* from that which has long been the established usage of the said United Church.

And the second:

> In submitting these recommendations to your Majesty, we desire to state that we are anxious in no degree to abridge or curtail any of the rightful liberties heretofore enjoyed by the clergy and laity of the United Church. The National Church may well include men of varying shades of opinion so long as they can combine in a conscientious acceptance of her recognized formularies and appointed rites.
>
> But this large comprehension seems to us to render it *most desirable that in the celebration of the Church's rites there shall be introduced no novel practices*, which are welcome only to some, but are offensive to others. All members of the Church being expected to join devoutly in one common form and order of service, are, as we conceive, *entitled to expect that no unaccustomed form be used*, giving to the service a new tendency and significance by which the devotion of many is impeded.

And that he has, since this very judgment, endorsed these reports; saying, in moving the Lectionary Bill:

> An objection had been made that the bill did not carry out the other recommendations of the commissioners. But those recommendations involved so many differences of opinion, the Government felt that they could not undertake a more extensive measure than the present with any hope of passing it through Parliament within a reasonable time. *A recent decision of the Privy Council would tend ultimately in the direction desired by the report of the commissioners.*—*Standard*, March 14th, 1871.

Let it be remembered that the Archbishop of York refused to sit on the Ritual Commission, because its composition was too favourable to the Ritualists!

And, lastly, that it would have been easy to constitute a tribunal adequate to the importance of the question, and free from every suspicion of partiality, by summoning the chiefs of the Common Law Judges and the Lords Justices of Appeal, either in addition to, or in substitution for, the members who actually composed the tribunal.

The judgment under consideration deals with four points: The use of certain Vestments, the administration of the Mixed Chalice, the administration of Wafer-bread, and the position of the priest between the people and the holy table, with his back to the people during the prayer of consecration—all acts or matters relating to the celebration of the Holy Eucharist.

The Vestments will come first. They are, as it is admitted on all sides, governed by the rubric as to "ornaments," at the beginning of our present Prayer Book, subject to some question as to the authority of the Canons of 1603 which will be discussed hereafter.

It may be as well at once to say, for the benefit of non-legal readers, that the way in which the rubrics and directions in our present Prayer Book come to have the force of law, is this: The last and existing Act of Uniformity (13 & 14 Car. II. c. 4), enacts by section 2:

> That all ministers . . . . shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both the sacraments, and all other the public and common prayer, in such order and form as is mentioned in the said book annexed and joined to this present Act, and intituled the Book of Common Prayer, and administration of the Sacraments, and other rites and ceremonies of the Church, according to the use of the Church of England. . . . .

And by section 17:

> That no form or order of common prayers, administration of sacraments, rites or ceremonies, shall be openly used in any church, chapel, or other public place of, or in any college or hall in either of the universities, the colleges of Westminster, Winchester, or Eton, or any of them, other than what is prescribed and appointed to be used in and by the said Book.

The Book of Common Prayer enforced by this Act is the present one; and, by virtue of the provisions of this Act, this book, with all the rubrics and directions therein, becomes incorporated into the statute, and has all the force of an Act of Parliament.

Now the rubric in question is as follows:

> And here is to be noted, that such ornaments of the Church, and of the ministers thereof, at all times of their ministration shall be retained, and be in use, as were in this Church of England, by the authority of Parliament, in the second year of the reign of King Edward the Sixth.

The ornaments of the minister during the celebration of the Holy Communion are, according to the authority of the first Prayer Book of Edward VI., these:

> Upon the day and at the time appointed for the ministration of the Holy Communion, the priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration, that is to say, a white alb, plain, *with a vestment or cope*, and where there be many priests or deacons,

then so many shall be ready to help the priest in the ministration as shall be requisite, and shall have upon them likewise the vestures appointed for their ministry, that is to say, albs with tunicles.

The word "vestment," it is allowed, means "chasuble."

The words in our present rubric "by authority of Parliament" were decided by the Privy Council, in Westerton *v.* Liddell, to mean by the first Act of Uniformity in Edward VI.'s reign establishing his first Prayer Book; and that decision has been accepted as law in the present case; so that the rubric may be read: "Such ornaments of the Church and of the ministers thereof . . . . shall be retained, and be in use, as were in this Church by authority of the first Prayer Book of Edward VI., and the Act enforcing it."

Certainly the apparent meaning of these words is, as has always been contended by the Ritualist party, that the vestments as ordered for the minister by the first Prayer Book of Edward VI., should be the vestments in use now: so the Court of Arches in this case decided, and so the Privy Council *seemed* to have already decided in Westerton *v.* Liddell.

The case of Westerton *v.* Liddell related to certain ornaments and decorations in the churches of S. Paul and S. Barnabas, Knightsbridge, which the Low Church party were anxious to take away. Among them were the Cross and the Credence table. In the lower courts both these articles had been treated as ornaments of the Church within the meaning of this rubric, the questions there discussed being, (1.) Whether these supposed ornaments were in use or not under the first Prayer Book of Edward VI.; (2.) Whether they fell, as ornaments, under the rubric to the present Prayer Book, so as to be lawful or not, according to their use or non-use in the time of Edward VI.'s first Prayer Book. The Privy council held that the Cross was not an "ornament" in the technical sense, but an architectural decoration; they, however, came to this conclusion mainly in consequence of a consideration of the rubrics as to ornaments, and of the results which would follow if the Cross were an "ornament," and as such bound by the rubric of the present Prayer Book; while as to the Credence table, they expressly decided that it was an ornament, and a lawful one, under this rubric. This being the case, their view of the relations of the present rubric to the first Prayer Book of Edward VI. became a necessary part of their judgment; not a "dictum" in forensic language, though the "dicta" even of judges of such eminence could never be lightly regarded, but an integral portion of the principles on which their judgment rested.

This is their language:

That the word "ornaments" applies, and in this rubric is confined to those articles the use of which in the services and ministrations of the Church is prescribed by the Prayer Book of Edward the Sixth.

Great stress has been laid by the opponents of the Eucharistic vestments on the words "retained and be in use;" as if this implied a double condition, that the ornaments in existence at the time of the rubric should be, if they were also in use under the first Prayer Book of Edward VI., retained and kept in use.

But it is clear that these words "retained and" have found their way into the present rubric by an error. In the Prayer Book of Elizabeth, where it was intended to preserve the *services* of the second Prayer Book of Edward VI., but the *dresses* of the first Prayer Book, the rubric was:

And here is to be noted that the minister, at the time of the Communion, and at all other times of his ministration, shall use such ornaments in the church *as were in use by authority of Parliament* in the second year of the reign of King Edward the Sixth, according to the Act of Parliament set in the beginning of this book.

This Prayer Book was enforced by an Act of Uniformity; but in this Act it was intended to give the Queen a power of altering these ornaments without coming to Parliament, and therefore a clause in the Act enacted:

That such ornaments of the Church, and of the ministers thereof, shall be *retained and be in use*, as was in this Church of England, by authority of Parliament, in the second year of the reign of King Edward the Sixth, until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of the commissioners as appointed and authorised under the Great Seal of England for causes ecclesiastical, or of the Metropolitan of this realm.

Clearly the words "retained and" had no distinguishing or special meaning here. James I.'s Prayer Book has the same rubric as Elizabeth's.

Now the prosecution in the present case rely on these words, "retained and;" and they say that the Queen, under the power given her by this Act, altered the Ornaments after this Act, and that therefore these Ornaments were not in existence at the time of our present rubric, and are excluded by force of the words "retained and." But here again we have a direct decision on this point in Westerton *v.* Liddell.

It will be observed that this rubric *does not adopt precisely* the language of the statute, but *expresses the same thing in other words*. The statute says, such ornaments of the church and of the ministers thereof shall be retained and be in use; the rubric that the minister shall use such ornaments in the church.

The rubric to the Prayer Book of January 1st, 1604, adopts the language of the rubric of Elizabeth. The rubric to the present Prayer-Book adopts the language of the statute of Elizabeth; *but they all obviously mean the*

same thing, that the *same dresses* and the same utensils, or articles, which were used under the first Prayer-Book of Edward the Sixth may still be used.

This passage would seem almost prophetically framed with a view to the present case. Not only so, but in Martin *v.* Mackonochie the then Privy Council expressly adhered to the ruling in Westerton *v.* Liddell. Now the way in which the Privy Council attempt to evade these authorities in our present case is as follows :—

In Liddell *v.* Westerton the question which their Lordships had to decide was, whether the Rubric which excluded all use of crosses in the service, affected crosses not used in the service but employed for decoration of the building only, and they determined that these were unaffected by the rubric.

They decided that the rubric in question referred to the Act passed in 2 and 3 Edward VI. adopting the first Prayer-Book, and not to any canons or injunctions having the authority of Parliament, but adopted at an earlier period. Their Lordships feel quite free to adopt both the positive and the negative conclusions thus arrived at. In construing the expressions made use of in that judgment, it should be borne in mind that this question of the vestments was not before the Court.

In Martin *v.* Mackonochie the Committee stated anew the substance of the judgment in Liddell *v.* Westerton upon this point, but did not propose to take up any new ground.

This would seem as if the question of the Cross was the only one before the Privy Council in Westerton *v.* Liddell, whereas that of the Credence Table was also before them, and was for this purpose more important than that of the Cross ; and that the question as to the present rubric was only whether it let in canons and injunctions previous to the first Prayer-Book of Edward VI. ; whereas the decision really was, that, in construing the present rubric, the rubric of Edward VI. alone, and no canons or injunctions, or other orders, whether before or after the first Prayer Book of Edward VI., were to be looked at. It will seem, too, as if in Martin *v.* Mackonochie the tribunal had merely stated historically, without approval or sanction, "the substance of the judgment" in Westerton *v.* Liddell ; whereas in fact they not only state that they "entirely concur" in "its conclusions," but they build upon it, avowedly, a great part of their decision in the case before them. (2 L. R., P. C., p. 390.)

In fact if logic and the "Laws of thought" are worth anything, the judgment in Westerton *v.* Liddell completely settled the question ; deciding, not indeed the actual particular case, but reasoning from premisses to a general conclusion, embracing Ornaments both of the Church and of the Minister.

Now let us see the line of positive argument which is to the Privy Council so convincing, that for it they run counter

to all the previous decisions of their tribunal. Having cited the clause in the Elizabethan Act of Uniformity, empowering the Queen with the consent of the Commissioners or the Metropolitan to take other order, they say:

The injunctions of Elizabeth appeared in the same year, 1559, and one of them orders that "the churchwardens of every parish shall deliver unto the visitors the inventories of vestments, copes, and other ornaments, plate, books, and specially of grails, couchers, legends, processionals, hymnals, manuals, portasses, and such like, appertaining to the church." (*Cardwell Doc. Ann.* i. 228.) Commissioners began to carry out these injunctions in the same year.

They seem to infer that these orders would amount to the destruction of vestments and copes; but the fact is that the "Interpretations and further considerations" of these very injunctions, drawn up by the Archbishop and Bishops, explain them thus:

First. "That there be used only but one apparel; as *the cope in the ministration of the Lord's Supper* and the surplice in all other ministrations." (1 *Cardwell Doc. Ann.* p. 238.)

Then the Privy Council proceed to set out the Advertisements, which appeared in the year 1564, as follows:

In the ministration of the Holy Communion now in cathedral and collegiate churches, the principal minister *shall use a cope*, with gospeller and epistoler agreeably; and at all other prayers to be said at the said Communion Table *to use no copes but surplices*.

That every minister saying any public prayers or ministering the Sacraments or other rites of the Church, *shall wear a comely surplice* with sleeves, to be provided at the charge of the parish.

And they say:

These advertisements were very actively enforced within a few years of their publication.

They assume that these Advertisements are negative as well as positive: that in enjoining what they do they forbid what they do not; and they construe them therefore as forbidding the Eucharistic vestments in parish churches. Some attempt is made to deal with the reasoning in the judgment of the Court of Arches that the Advertisements were not intended to alter the law, but only to enforce a decent minimum of the lawful ritual; though no mention is made of the authority of Collier and Lathbury, there cited, to show that the Puritans, not the High Churchmen, were the party that objected to them. But no attempt is made to meet the argument that when the Advertisements wish to negative, they use express words, "at all other prayers .... to use *no copes but* surplices;" and that here no express words of negation are used. Perhaps this silence may be explained by the extraordinary but nevertheless apparent fact that the Privy Council

thought it impossible to use a surplice with a cope, and that therefore the ordering of the one is the forbidding of the other. Thus indeed they say:

> If the minister is ordered to wear a surplice at all times of his ministration, *he cannot wear an alb* and tunicle when assisting at the Holy Communion; if he is to celebrate the Holy Communion in a chasuble, *he cannot celebrate in a surplice.*

Yet the rubric to the first Prayer-Book of Edward VI. orders "*a white alb plain with a vestment or cope.*" And the rubric at the end of the Communion Service in the same Prayer-Book says:

> And though there be none to communicate with the priest, yet these days (after the Liturgy ended) the priest shall put upon him a plain *alb* or *surplice, with a cope*, and say all things at the altar (appointed to be said at the celebration of the Lord's Supper) until after the offertory.

Thus showing two things: (1.) That alb and surplice are practically identical; (2.) that a cope may be and is to be worn with a surplice.

Nor again have they dealt with the argument that when the 82nd canon prescribed that the holy table should be "covered with a carpet of silk or other decent stuff," and Dr. Lushington held that this canon, by not mentioning, excluded more than one covering, or a covering that was more than merely a carpet of silk or decent stuff, the Privy Council in Westerton *v.* Liddell reversed this decision, saying:

> Their Lordships are unable to adopt this construction. An order that a table shall always be covered with a cloth surely does not imply that it shall always be covered with the same cloth or with a cloth of the same colour or texture. The object of this canon seems to be to secure a cloth of a sufficiently handsome description, not to guard against too much splendour. (Moore, p. 188.)

To return to the present judgment; the next point taken by the Court is, that after the Advertisements chasubles (or vestments) were systematically destroyed. Be it so; but their own documents show that the *cope* was in general use. They say:

> But, as has been said, the contemporaneous evidence as to the abolition of all vestments obnoxious to the Puritan party (other than the surplice, hood, and tippet, and the square cap) is abundant.

Yet they in the next sentence say:

> In a scarce book, called *A Part of a Register*, in which is a considerable number of documents collected by those who objected to Church Ritual, the complaint is uniformly *against copes and surplices.*

It is curious certainly that another passage from this very book, not noticed by the Privy Council, was cited in the

Arches' judgment. This quotation shows the very general use of the cope.

> Doe not the people think a more grievous fault is committed if the minister doe celebrate, etc., *without a surplesse or a cope*, than if the same through his silence should suffer an hundred souls to perish. (p. 45.)

Besides this book, almost all their quotations speak of the cope as in actual use. Sir J. Dodson, in the Arches Court, in Westerton *v.* Liddell, quoted Bishop Sandys as saying, "Only the Popish vestments remain in our Church: *I mean the copes.*" (Moore, p. 116.) Now it will be remembered that Edward VI.'s Rubrics order a "vestment" (*i. e.* a chasuble) or a "cope." Either therefore might be used; it is possible that the cope might have become the common dress instead of the chasuble; but that would not show the desuetude or repeal of the rubric. On the contrary, it would show that the rubric was in full force.

As to the disuse of vestments after 1662 (the date of our present Prayer Book), they quote Bishop Cosin as enforcing the surplice, without a word as to enforcing the Eucharistic vestments; and they lay stress on this act as a contemporaneous exposition of the rubric by one of its framers; but they have omitted to notice that Cosin, in the second and third series of his *Notes on the Prayer Book*, distinctly laid down that the Eucharistic vestments ordered in the rubric to the Elizabethan Prayer Book were still (in Charles I.'s time, after Advertisements, Canons, and everything) retained.

These passages were not quoted in the Arches' judgment in this case, but they were quoted by Sir J. Dodson in the case of Westerton *v.* Liddell.

In the Second Series (written about 1638) the words are:—

> And yet this latter book (*i.e.*, the second Prayer Book of Edward VI.), and Act of Parliament thereto annexed, did not condemn either the ornaments or anything beside that was appointed in the former book (*i.e.*, the first Prayer-Book), but acknowledged it all to have been a very godly order agreeable to the Word of God and the primitive Church. Whereupon, by authority of Parliament in the first year of Queen Elizabeth, albeit it was thought most meet to follow and continue the order of Divine Service in psalms, lessons, hymns, and prayers (a few of them only varied,) which was set forth in the fifth year of King Edward (the second Prayer-Book), yet for the ornaments of the church, and of the ministers thereof, the order appointed in the second year of his reign (the first Prayer-Book) was *retained* and *the same are we bound still to observe.*

In the Third Series, said to have been written about 1640, the ruling is the same. (Moore, pp. 126, 127.) We shall have occasion again to refer to the Privy Council's way of dealing with Cosin.

The actual question of the legality of the Advertisements will not be here treated of. But we may observe that if the Advertisements were lawful, as the Privy Council say, on the principle that the Archbishop put them out and the Queen assented to their being enforced, what is to be said as to the Injunctions of Elizabeth, with their "Interpretations" enforcing the cope—Injunctions issued by the Queen, Interpretations by the Archbishop and not objected to by the Queen? If the Advertisements are lawful, on the principle that we must believe "omnia rite esse acta," why was so little attention paid to the Injunctions of Edward VI. by the Privy Council in Martin *v.* Mackonochie? The reader will observe that many things are necessary in order to make the Vestments of the first Prayer Book of Edward VI. *not lawful now*. (1.) That the words "retained and" shall mean that these Vestments would not be lawful unless they were in legal existence at the time of the framing of the present rubric; (2.) that they were not in legal existence. Not to be in legal existence, they must either (*a*) have been repealed by the Advertisements, or (*b*) affected in some way by the Canons. To have been repealed by the Advertisements, the Advertisements must have had legal power to repeal, *and they must have been intended to repeal*, the law.

There are, however, two points remaining: the question of the force of the Canons of 1603, and the question of disuse. The Canons of 1603 are very much to the same effect as the Advertisements, to which indeed they refer. They enforce the cope in cathedrals, and the surplice in parish churches. They use no words of negation or prohibition. As to them, the Privy Council say that there are three views of the effect of the present rubric on the Canons: (1.) That the rubric repealed the Canons; (2.) that the rubric and the Canons set up two standards of ritual, an ornate and a simpler one, both in force at the same time; (3.) that they are to be construed together as making one law. As to (1.) they say that it is the opinion of Dr. Lushington and of Sir John Dodson in Westerton *v.* Liddell, but that it is a wholly modern one, and they reject it. Now it certainly was the opinion of Dr. Lushington; he speaks of the argument about it as an "irresistible argument;" *but it was also the opinion of the Privy Council in the same case*—as we have already shown, but they have neglected to show; it was also the opinion of Dr. Burn, the standard writer on ecclesiastical law in the last century; of Bishop Gibson, in his *Codex Juris Ecclesiastici Anglicani*, the great work on English ecclesiastical law, first published about 1740—not such very modern authority;—of

Prideaux, in his *Churchwarden's Guide;* of Dr. Stephens himself, the counsel retained for the prosecution, in his edition of the Book of Common Prayer; of the late Bishop of Exeter, sitting as Judge on the Incumbent of Helston; and of a consensus of eminent lawyers. It is also the view taken by the Dean of the Arches in his judgment—not that ascribed to him as view No. 2, that the Canons and rubric together enacted two different standards, both in force, a view impossible to be held, we should have said, by any legal mind—for he has expressly said of the Canons that they were merely an attempt to procure a decent ritual, an enforcing of a necessary minimum because the legal maximum could not be obtained.

What, then, are the arguments on which the Privy Council build their conclusion (No. 3.). That the present Act of Uniformity, by section 24,

Shows that it was not the intention of the passers of the Act to repeal past laws.

It provides that "the several good laws and statutes of this realm which are now in force, for the uniformity of prayer and the administration of the Sacraments .... shall stand in full force and strength, to all intents and purposes whatever, *for the establishing and confirming the said book.*" The laws were to remain; but they were to bear on the new Book of Common Prayer, and not upon any former one.

Of course the laws were to remain; but they were to be laws for *establishing the Prayer Book,* not for altering it. The section relates to the punitory and enforcing clauses in the Elizabethan Act of Uniformity, etc., giving power to indict offenders criminally, and enabling bishops and ecclesiastical judges to proceed for the purpose of enforcing uniformity in places otherwise exempt from their ordinary jurisdiction.

The next argument is that:

The Prayer Book up to that time in use, the book which was the subject of the Hampton Court Conference, rested upon the Canons of 1603-4; and it is hard to suppose that the most obvious "laws" of all, those in force up to that moment, were excluded from the saving power of this 24th clause.

Why, one would suppose, and not only in this passage, that their lordships considered the Canons as equivalent to Acts of Parliament, universally binding, and able indeed to repeal previous statutes. Their lordships, one would imagine, must have forgotten the general principles of constitutional law, laid down in James I.'s reign, but a few years after these very Canons were enacted, and held ever since (12 Co. 72), that Canons, even with the royal assent, have no effect as against the common law, statute law, or any custom of the realm. "Prayer Book rest upon the Canons," a Prayer Book that was to be enforced against laity as well as clergy, and infringements of which

might be punished by fine and imprisonment in temporal courts! Why, Lord Hardwicke and the Queen's Bench decided in George II.'s time that these Canons had no effect at all upon the laity, and could not inflict a fine of £10 upon them for violating the law about marriages! (Middleton *v.* Croft, Strh. 1056.) Prayer Book to be construed in accordance with the Canons in matters of ceremonial! Why, in Martin *v.* Mackonochie the Privy Council expressly said:

> If the use of lighted candles in the manner complained of *be a ceremony, or ceremonial act*, it might be sufficient to say that it is not, nor is any ceremony in which it forms a part among those retained in the Prayer Book, *and it must therefore be included among those that are abolished;* for the Prayer Book in the Preface, divides all ceremonies into these two classes: those which are retained are specified, whereas none are abolished specifically or by name; *but it is assumed that all are abolished which are not expressly retained.*—2 *L. R., P. C.* p. 388.

Then there remains the argument of disuse. Their lordships do indeed say that desuetude cannot repeal a contrary enactment; it had been said often before, notably by Dr. Lushington in Westerton *v.* Liddell (Moore, pp. 45, 79); but still they attach the greatest weight to "contemporaneous and continuous usage" in construing the law. They do not even notice the sixteen closely printed pages of argument upon this point in the Arches' judgment of Martin *v.* Mackonochie, (2 L. R., A. & E. pp. 174-190,) referred to and supplemented in the judgment of the same court in this case (3 L. R., A. and E. pp. 90-92); nor do they notice the incontrovertible instances (eight at least are given) of disuse of things plainly ordered by the ecclesiastical law; nor the fact that disuse would of all things have told most strongly against the Credence-table and Cross, both allowed by the Privy Council; nor that the same argument of disuse tells conclusively against their own final ruling, "that the cope is to be worn in ministering the Holy Communion on high feast days in cathedrals and collegiate churches, and the surplice in all other ministrations;" (for as matter of fact the cope is not now, and has not been for very many years, worn in any cathedral or collegiate church;) nor the fact that the surplice was so generally disused in preaching, that an order to the clergy of London to substitute it for the black gown, in 1842, raised a storm and a commotion almost unexampled in post-Reformation history.

We subjoin a list of legal authorities on the question of Vestments before the hearing of this case.

In favour of the legality of the Eucharistic vestments:

Writers.—Bishop Gibson's *Codex* (two editions); Mr.

Prideaux and his editors; Dr. Burn and his various editors; Dr. Stephens.

Courts.—The Privy Council, in Westerton *v.* Liddell, supported by the Privy Council in Martin *v.* Mackonochie; the late Bishop of Exeter, in the Helston case.

Judges and eminent lawyers who have given opinions on this subject when at the bar.—Lord Chelmsford; the Lord Chief Justice of the Common Pleas; the Lord Chief Baron; the Lord Justice James; the Dean of the Arches; Mr. Justice Hannen; the Solicitor General; Dr. Deane, Q.C.; Mr. Prideaux, Q.C.

Against:

Writers.—None.

Courts.—None.

Lawyers.—Lord Cairns; Lord Justice Mellish; Sir Roundell Palmer.

On the Mixed Chalice there is less to be said from the point of view of this Article. The Privy Council do not notice the authority of Cosin, quoted by the Dean of the Arches, just as they do not notice the same authority, similarly quoted, as to the Wafer-bread, nor the quotations from him by Sir J. Dodson in Westerton *v.* Liddell, as to the Vestments; though they *do* quote him when they think him in their favour, especially as to "standing before the table."

But the real objection to the judgment on this point is, that it ultimately decides the matter, not as one of pure law, but as one of relative importance. It says:

> Their lordships gladly leave these niceties of examination to observe that they doubt whether this part of the article is of much importance. . . . The private mingling of the wine is not likely to find favour with any.

That is, We do not think much outcry will be raised against our ruling in this matter, so we will do it—a slip, inadvertently disclosing the real principle of the judgment, to condemn as many "Ritualistic practices" as they can—with comparative safety.

The question as to the Wafer-bread is more complicated; but also far graver. The decision is that Wafer-bread is unlawful, and that the best wheat bread, such as is usual to be eaten, is alone lawful.

Now the history of the law on this subject is this.

The first Prayer Book of Edward VI. provided as follows:

> For avoiding of all matters and occasion of dissension, it is meet that the bread prepared for the Communion be made through all this realm after one sort and fashion; that is to say, unleavened and round, as it was afore, but without all manner of print, and something more larger and thicker than it was, so that it may be aptly divided in divers pieces; and

every one shall be divided in two pieces at the least, or more, by the discretion of the minister, and so distributed. And men must not think less to be received in part than in the whole, but in each of them the whole Body of our Saviour Jesus Christ.

The second Prayer Book of Edward VI., being the same as that of Elizabeth, provided thus :

And to take away *the superstition* which any person hath or might have concerning the bread and wine, it shall suffice that the bread be such as is usual to be eaten *at the table with other meats*, but the best and purest wheat bread that conveniently may be gotten.

The rubric to the present Prayer Book is as follows :

And to take away *all occasion of dissension and superstition* which any person hath or might have concerning the bread and wine, it shall suffice that the bread be such as is usual to be eaten ; but the best and purest wheat bread that conveniently may be gotten.

The Injunctions of Queen Elizabeth, published in 1559, prescribe a special form of Wafer-bread as the only one to be used :

Where also it was in the time of King Edward the Sixth used to have the sacramental bread of common fine bread, it is ordered for the more reverence to be given to the holy mysteries, being the sacraments of the Body and Blood of our Saviour Jesus Christ, that *the same sacramental bread* be made and formed plain, without any figure thereupon, of the same fineness and fashion round, though somewhat bigger in compass and thickness, as the usual bread and wafer, heretofore named singing-cakes, which served for the use of the private masse.

These Injunctions, if they ever had authority, ought, according to the view of the Privy Council as to the Canons, (in the matter of Vestments,) to be construed in agreement with the rubric to the present book ; but, conceding that the Injunctions were repealed by the rubric, you have the strongest "contemporanea expositio" from them, from the letter of Archbishop Parker, cited by the Judge of the Arches, and not noticed by the Privy Council, and from the actual usage, as evidenced by Cosin (*see* below), and by Hooker (Book iv. *passim*), that Wafer-bread was lawful in the time of Elizabeth. Now in what does her Rubric differ effectually from the present one ? One has "to take away the superstition . . . . it shall suffice," the other, "to take away all occasion of dissension and superstition . . . . it shall suffice." It is on this difference that the Privy Council seem to rely in one place, for they say, "the present rubric . . . . introduces words which have been prominent in the argument in this case." But eventually they deal with the matter in the following way. They say that the first Prayer Book of Edward VI. provided one rule ; the Elizabethan Prayer Book a second rule ; and the Elizabethan Injunction a third rule, "*at variance with the Elizabethan rubric ;*" that all these

rules were intended to, and did in fact, produce uniformity, and not variety; and that, therefore, the second of them—that of the Elizabethan Prayer Book—produced uniformity, that is, uniformity in having common bread and no wafers, which uniformity, therefore, would also be the rule under the present rubric.

They sum up thus:

So there are three distinct orders: first, for wafer-bread, unleavened as before, but larger and without print; then for common bread usual at the table; then for a new kind of bread, thicker than the wafer and without symbolical figures; and the first and last are in their form universal and absolute; and the second also had brought about a general usage, and not a diversity. There was, no doubt, a great division of opinion upon this question; and this makes it all the more remarkable, that none of the three orders takes the natural course of leaving the matter free. Each seems to have aimed at uniformity, but each in a different practice.

Now, in order to hold this, they are obliged to hold that the Injunctions of Elizabeth "superseded" the rubric, repealing its positive provisions, and not merely enforcing where it had left a discretion: and they are severe on the Judge of the Arches for calling the Injunctions a "contemporanea expositio" of the rubric. And then they never even mention that Parker, Elizabeth's first archbishop, and one of the framers of the Injunctions, wrote a letter to Sir W. Cecil, in 1570,—set out at length in the Arches' judgment, and too long for this place,—in which he lays down that the Injunctions do not, and were not intended to, supersede the statute, *but to operate concurrently with it.*

This letter is apparently the main ground of the Arches' decision, yet the Privy Council do not notice it. But, independently of Parker's letter, it is clear that the Injunctions did not mean to repeal the previous rubric; they say, "Where also it was .... used to have the sacramental bread of common fine bread, it is ordered .... that *the same sacramental bread* be made," etc. They do not order a new kind of bread, but that the same should be shaped in a particular way.

Then the court come to deal with the words "it shall suffice;" and they say:

Their lordships are disposed to construe this phrase in each case according to the context. Here the expression is, "to do away all occasion of dissension and superstition .... it shall suffice." If these words left the whole matter open, and only provided that the usual bread should be sufficient where it happened to be used, it is difficult to see how either dissension or superstition would be taken away: not dissension, for there would be a licence *that had not existed since the Reformation; not superstition, for the old wafer* with its "print," its "figures," which the first book of Edward

and the injunctions desired might be excluded, *might now be used* if this rubric were the only restraint. Their lordships are therefore inclined to think on this ground alone, that the rubric contains *a positive direction to employ* at the Holy Communion the usual bread.

Why, omitting the word "dissension,"—which is probably an accidental importation from the first Prayer Book of Edward VI.,—all these words about superstition, etc., occurred in the Elizabethan rubric; and how does Parker in his letter, how did the universal practice, construe them?

And whereas it is said in the rule, that "to take away the superstition which any person hath, or might have, in the bread and wine, it shall suffice that the bread be such as is usually to be eaten at the table with other meats," etc. "*It shall suffice*," I expound, where either there wanteth such fine usual bread, or superstition be feared in the wafer-bread, they may have the Communion in fine usual bread; *which is rather a toleration in these two necessities, than is in plain ordering as is in the Injunction.*

And Cosin records:

This liberty of using Wafer-bread was continued in divers churches of the kingdom till the 17th of King Charles.—3 *L. R., A. and E.*, p. 105.

Finally, the court revert to their old argument of disuse; while they take no notice of the ruling in Westerton *v.* Liddell (cited to them by the Arches), as to the covering for the holy table (*See* p. 208 *supra*), which shows that an ordering of one thing which is the minimum of sufficiency, does not thereby prevent the addition of something else which may be better.

Lastly, as to the charge of standing between the people and the holy table with the back to the people, so that the people could not see the bread broken.

Now we are not going into any of the antiquarian or other discussions as to standing at the north side of the holy table during the Communion Service. We will admit, for this purpose, that the law is that the priest shall stand at the north end, with his side to the people during the service, *till he come to the prayer of Consecration.* The simple question before us is, Whether the Privy Council have not, in deciding as they have now done, that the priest must not stand during the prayer of consecration between the people and the holy table with his back to the people, directly reversed their own decision, given not three years ago, in the case of Martin *v.* Mackonochie?

Mr. Mackonochie was charged with violating the rubric by kneeling instead of standing during a part of the prayer of consecration. It was contended on his behalf that there were no specific directions on the point; but their lordships held otherwise. They said:

The rubric before the prayer of consecration then follows, and is in these words: "When the priest, standing before the table, hath so ordered

the bread and wine that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the prayer of consecration as follows :"

Their lordships entertain no doubt on the construction of this rubric, *that the priest is intended to continue in one posture during the prayer, and not to change from standing to kneeling,* or *vice versâ ;* and it appears to them equally certain that the priest is intended to stand and not to kneel. They think that *the words "standing before the table" apply to the whole sentence;* and they think this is made more apparent by the consideration that acts are to be done by the priest before the people, as the prayer proceeds (such as taking the paten and chalice into his hands, breaking the bread, and laying his hand on the various vessels), which could only be done in the attitude of standing.—2 *L. R., P. C.* p. 382.

This construction, it may be remembered, has since been twice enforced, with the severest penalties, against Mr. Mackonochie. On this the Arches Court, holding that "between the people and the table with the back to the people" was "before the table," dismissed the charge against Mr. Purchas, on the ground that by the Privy Council construction of the rubric the priest was bound to "stand before the table" during the prayer of consecration.

How do the Privy Council deal with this in the present case? They say:

This passage refers to posture or attitude from beginning to end, and not to position with reference to the sides of the table. And it could not be construed to justify Mr. Purchas in standing with his back to the people, unless a material addition were made to it. The learned Judge reads it as if it ran, "They think that the words standing before the table apply to the whole sentence, *and that before the table means between the table and the people on the west side.*" But these last words are mere assumption. The question of position was not before their lordships; *if it had been, no doubt the passage would have been conceived differently,* and the question of position expressly settled.

There are, as it were, two arguments here; one, that the ruling in the former judgment not being actually on this point, though the reasoning, the necessary logical course of argument, must be the same, the former judgment is of no force—a conclusion that would cut at the root of more than half our law, which is founded on precedent; and the other, not an argument, but a suggestion, that "standing before the table" does not necessarily mean "standing between the table and the people."

But they evidently do not rely upon this last construction; for they also say:

Their Lordships incline to think that the rubric was purposely framed so as not to direct or insist on a change of position in the minister, which might be needless, though it does direct a change of posture from kneeling to standing. The words are intended *to set the minister free for the moment* from the general direction to stand at the north side for the special purpose of ordering the elements; but whether for this purpose he would have to change the side or not is not determined, as it would depend on the position

of the table in the church or chancel, and on the position in which the elements were placed on the table at first. They think that *the main object of this part of the Rubric is the ordering of the elements:* and that the words "before the table" do not necessarily mean "between the table and the people," and are not intended to limit to any side.

That is, the words "standing before the table" set the minister free for the moment, *and for the moment only*, of ordering the elements, to stand where he likes, *and do not apply to his position during the subsequent prayer of consecration;* though the same words *compel him to stand and not kneel during the whole of this very same prayer!*

To sum up then; for their judgment in this, the Purchas case, the Privy Council have directly contradicted the previous judgments of the same tribunal in Westerton *v.* Liddell and Martin *v.* Mackonochie. They have given a force to the Canons repudiated by every court of justice in England. They have stated that construction of the Ornaments rubric in our Prayer Book to be "a modern one," which has been held by every court of justice, and by every legal authority (with the one exception of the opinion of Lord Cairns, Lord Justice Mellish, and Sir R. Palmer), from its very enactment down to the present day. They have relied on the argument from usage and desuetude, when the very foundation of that argument has been sapped by an historical analysis, unnoticed by them though necessarily before their eyes, when the argument has been rejected by their own court in a former case, and when it would, if true, destroy as well their own conclusions. They have quoted authorities when in their favour, and have not even recorded the same authorities when they were against them. When we find phenomena such as these occurring in a judgment drawn up by men of ability and of great position, we regret that it should seem impossible to explain them upon any other hypothesis than that of a predetermined and ineradicable intention in the minds of the majority of the court to condemn at all hazards the "novel practices" of the so-called Ritualists.

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SWIFT AND CO., REGENT PRESS, KING STREET, REGENT STREET, W.